

Before the  
Federal Communications Commission  
Washington, D.C. 20554

In the Matters of	)	WTB Docket No. 98-181
	)	
NORCOM COMMUNICATIONS	)	
CORPORATION	)	
	)	
ASSOCIATION FOR EAST END LAND	)	
MOBILE COVERAGE	)	
Business Radio Station License WPAT918	)	
New York, New York/Long Island Area	)	
	)	
LMR 900 ASSOCIATION OF SUFFOLK	)	
Business Radio Station License WNXT323	)	
New York, New York/Long Island Area	)	
	)	
METRO NY LMR ASSOCIATION	)	
Business Radio Station License WPAZ643	)	
New York, New York Area	)	
	)	
NY LMR ASSOCIATION	)	
Business Radio Station License WPAP734	)	
New York, New York/Long Island Area	)	
	)	
WIRELESS COMMUNICATIONS	)	
ASSOCIATION OF SUFFOLK COUNTY	)	
Business Radio Station License WPAT910	)	
New York, New York/Long Island Area	)	

SEP 23 2 05 PM '99  
FEDERAL COMMUNICATIONS COMMISSION  
FCC MAIL SECTION

**Appearances**

*Russell H. Fox, Esq. and Russ Taylor, Esq.* on behalf of Norcom Communications Corporation ; *George Petrutsas, Esq. and Ann Bavender, Esq.* on behalf of Association For East End Land Mobile Coverage, LMR 900 Association of Suffolk, NY LMR Association "The Associations", and *Judy Lancaster, Esq. and Thomas Fitz-Gibbons, Esq.* on behalf of the Mass Media Bureau, Federal Communications Commission.

**SUMMARY DECISION OF  
ADMINISTRATIVE LAW JUDGE  
JOHN M. FRYSIAK**

PRELIMINARY STATEMENT

1. By Order to Show Cause, Hearing Designation Order and Notice of Opportunity for Hearing for Forfeiture ("HDO"), released October 14, 1998, the Federal Communications Commission ("Commission") designated the following issues for hearing:

(a) To determine whether Norcom, East End, LMR 900, Metro, NY and/or Suffolk violated Section 310 (d) of the Act by engaging in unauthorized transfers of control of Stations WPAT918, WNXT323, WPAZ643, WPAP734, and/or WPAT910 <sup>1/</sup>;

(b) To determine whether Norcom, East End, LMR 900, Metro, NY and/or Suffolk violated Section 90.179 (f) of the Commission's Rules, 47 C.F.R. § 90.179 (f), by operating Stations WPAT918, WNXT323, WPAZ643, WPAP734, and/or WPAT910 on a for-profit basis <sup>2/</sup>;

(c) To determine whether Norcom has abused the Commission's processes in connection with the creation and/or control of the Associations and/or with the control and/or operation of the Associations' stations;

(d) To determine, in light of the evidence adduced pursuant to the foregoing issues, whether Norcom, East End, LMR 900, Metro, NY and/or Suffolk are basically qualified to be Commission licensees;

(e) To determine, in light of the evidence adduced pursuant to issues (a-d), whether the above-captioned licenses should be revoked; and

(f) To determine, in light of the evidence adduced pursuant to issues (a-d), whether the above-captioned applications should be granted.

2. The HDO also proposed the imposition of a maximum forfeiture of \$185,000. for Norcom and \$37,000. for each Association. (HDO at ¶14).

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<sup>1/</sup> Subsequent to the release of the HDO, Metro N.Y. LMR Association and Wireless Communications Association of Suffolk County have surrendered their respective licenses for cancellation and withdrawn from this proceeding. See Memorandum Opinion and Order, FCC 99M-21, released March 19, 1999.

<sup>2</sup> See Footnote #1.

3. Presently, under consideration are Joint Motion for Summary Decision, filed July 22, 1999, by ("Norcom") and the Association for East End Land Mobile Coverage ("East End"), the LMR 900 Association of Suffolk ("LMR 900"), and the NY LMR Association ("NY LMR") (collectively the "Associations"); the Comments On Joint Motion For Summary Decision filed on August 5, 1999 by the Wireless Telecommunications Bureau ("WTB" or "Bureau") and the Joint Request For Approval and Adoption of Settlement filed July 22, 1999 by WTB, Norcom and the Associations.

4. In the HDO, the Commission alleged that Norcom played a substantial role in organizing the Associations and causing the Associations to seek the use of spectrum that could not be used for commercial operations (§11) ; that the management agreements under which Norcom managed the radio facilities of the Associations gave Norcom unacceptable control over the construction, daily operation, maintenance, management, and marketing of the Associations' stations and the personnel who performed these functions and substantial financial control over the Associations (§9) ; and that the Associations' stations were used to provide commercial service, in violation of the limitations on the use of the Associations' licenses (§10). Based on these allegations, the Commission asserted that there are substantial and material questions as to whether Norcom and the Associations have engaged in unauthorized transfers of control of the Associations' stations in violation of Section 310(d) of the Communications Act of 1934 (§9). In addition, the Commission has alleged there are substantial and material questions as to whether Norcom and the Associations used the stations licensed to the Associations to provide for-profit private carrier service in violation of Section 90.179(f) of the Commission's Rules (§10). The Commission has further alleged there are substantial and material questions as to whether Norcom abused the Commission's processes by setting up and controlling the Associations for the purpose of acquiring licenses it was not eligible to acquire in its own name (§12).

5. Subsequent to the issuance of the HDO, Norcom, the Associations and WTB conducted discovery. In addition, Robert Nopper, former principal of Norcom, Douglas Nopper, current principal of Norcom, and George Petrutsas counsel to the Associations when they were organized and obtained their FCC licenses, have provided sworn declarations reciting facts relevant and material to the issues in this proceeding. In light of facts brought to the Commission's attention since the HDO's release, the WTB and the counsel for the petitioners have engaged in extensive settlement discussions. On July 22, 1999, the Petitioners and WTB entered into a Settlement Agreement ("Agreement"), the approval of which together with the grant of the Joint Motion For Summary Decision would obviate the need of a hearing.

6. The Joint Motion For Summary Decision is supported by the Declaration of George Petrutsas (Ex. A), Robert Nopper (Ex. B) and Douglas Nopper (Ex. C), the Request of the Associations to the WTB for Admission of the Genuineness of Documents and Admission of Facts (Ex. D) and the WTB's Response thereto (Ex. E).

FINDINGS OF FACT

7. Norcom, located in Bayshore, New York, has been in the land mobile wireless business for many years (Ex. B, ¶1). It currently holds, among others, five Commission authorizations for 8000 MHZ Specialized Mobile Radio ("SMR") stations (HDO, ¶1). Pursuant to the authorizations, Norcom provides SMR and other communications services to customers on a for-profit basis (Ex. C, ¶2).

8. In 1990 and 1991, Norcom and its then principal, Robert Nopper, relying on the advice of Norcom's communications counsel, assisted in the formation of seven non-profit associations (Ex. A, ¶s 3-5 ; Ex. B ¶s 4-5). The Associations were formed in an attempt to assist small businesses to meet their communications requirements (Ex. B, ¶s 3-5). While SMR systems, such as those operated by Norcom, were able to meet some of those needs, Mr. Nopper and other individuals involved in various aspects of the land mobile wireless industry in the Long Island, New York area sought to foster the development of alternative two-way radio systems in the area (Ex. A, ¶3; Ex. B, ¶s 3-5).

9. Five of the Associations, with the assistance of Norcom and its counsel, obtained Commission licenses for FB7 stations on frequencies above 800 MHZ (Ex. B, ¶6). Three of the Associations, East End, LMR 900 and NY LMR, remain parties in this proceeding (See footnote 1 herein).

10. During the license application process, the Associations provided information to the FCC regarding Norcom's proposed role as manager of the Association's stations (Ex. A, ¶s 5-7; Ex. B, ¶7). For example, in response to a letter from the FCC, dated April 10, 1991, returning East End's application, East End advised the FCC that "the control point and mailing address is that of Norcom Communications Corporation. It is anticipated that Norcom will provide facilities for and will operate the control point of this Association as a contractor. Norcom also helped organize this Association" (Exhibit G, See attachment Ex. B, Norcom's Motion To Delete And/Or Change Issues, filed 12/9/98 ; Ex. A, ¶6 and Attachments 3,4.). In addition, the FCC was aware that Norcom would manage the two-way radio facilities licenses to the other Associations (Ex. B, ¶4 ; Ex. A, ¶s 6-7). Thus, the fact that Norcom was involved in the Associations' efforts to operate a two-way radio system was made known to the FCC's staff during the licensing process.

11. The seven Associations were represented by communications counsel who helped them prepare and submit their applications to the Commission (Ex. A, ¶6 and Attachments 3, 9, 11). During the processing of the applications, the Associations' counsel discussed with the FCC's staff the nature of the applicants, the proposed plan to provide service to eligible entities on a shared-cost basis, and the proposed system management role of Norcom in response to staff inquiries (Ex. A, ¶s 6-7 and attachments 2, 3, 4, 7, 9). The Commission's staff raised no further issues regarding these matters during the processing of the applications (Ex. A, ¶s 6-7). The FCC staff, however, continued to have concerns relating to the total number of frequencies requested by the seven Associations (Ex. A, ¶6). Accordingly, the FCC staff and the Associations agreed

upon an arrangement whereby two of the Associations withdrew their applications and the applications of four of the five remaining Associations were granted with the condition that the authorized systems would be "loaded" during a period shorter than that prescribed by the Commission's Rules. The fifth application was granted sometime later under approximately the same terms. (Ex. A, ¶7 and attachments 12, 13, 14, 15).

12. The five Associations' stations were subsequently constructed and managed on behalf of the Associations by Norcom pursuant to written management agreements (Ex. B, ¶6). Such arrangements were common at the time for the management and operation of SMR as well as private land mobile radio systems and the management agreements between Norcom and the Associations were typical of those used in the industry (Ex. A, ¶4). Briefly, each management agreement provided that, Norcom would construct, maintain, service, operate and market the station under the overall supervision of the Association licensee involved (Ex. A, ¶s 4, 8 and attachment 16).

13. Numerous small businesses on Long Island eligible under the Commission Rules to utilize the stations licensed to the five Associations began doing so to meet their communications needs (Ex. C, ¶s 2, 5). They receive two-way radio service from the Associations' stations at costs that are typically one-half that of industry competitors, including the rates charges by Norcom in its SMR business (Ex. C, ¶5). In 1996, after receiving an informal complaint from one of Norcom's competitors about these low rates, the Commission initiated an investigation of Norcom's and the Associations' compliance with the Commission's Rules (HDO, ¶2).

14. On July 31, 1997, the FCC granted an application proposing to transfer control of Norcom from Robert Nopper to Douglas Nopper (Ex. C, ¶2). The application was the result of Robert Nopper's desire (i) to exit the two-way radio business after over 20 years and pass-on the family business to his son, Douglas Nopper, and (ii) concentrate on his public safety duties as an Emergency Medical Services instructor, certified N.Y. state arson investigator, member of a local Fire District, and communications consultant to various public safety entities in the New York metropolitan area (Ex. B, ¶s 1-3 ; Ex. C, ¶2). Douglas Nopper, who was twenty-four at the time of the transfer, had been a college student in Albany, New York, during the time period in which the Associations were formed and granted FCC Licenses (Ex. C, ¶3). Douglas Nopper had no role in the formation of the Associations, or their efforts to secure FCC licenses. (Id.) Today, Douglas Nopper is the President and sole shareholder of Norcom and managers that company's two-way radio business (Ex. C, ¶s 1-2).

### DISCUSSION

15. Standards For Summary Decision. Section 1.251 of the Commission's Rules (47 C.F.R. §1.251 (a)(1)) provides for summary decision when there is no genuine issue of material fact for determination at hearing. The moving party bears the burden of demonstrating that "the basic facts are undisputed and the parties are not in disagreement regarding material factual inferences that may be properly drawn from such facts." *Ellis Thompson Corp.*, 10 FCC Rcd 12554 ¶62 (1995), citing *Big Country Radio, Inc.*, 50 FCC 2d 967, 968 (Rev. Bd. 1975). The designated

factual issues are considered seriatim.

(a) *To determine whether Norcom, East End, LMR, ...and/or... [NY LMR] violated Section 310 (d) of the Act by engaging in unauthorized transfers of control of Stations WPAT 918, WNXT 323, WPAZ 643, WPAP 734, and/or WPAT 910.*

16. Section 310 (d) of the Communications Act of 1934, 47 U.S.C. §310 (d), prohibits the transfer of control of a radio station without the Commission's prior approval. This section of the Communications Act has been interpreted to forbid either de jure or de facto transfer of control without prior approval by the FCC. *Lorraine Journal Co. v. FCC*, 351 F. 2d 824, 828 (D.C. Cir. 1965), *cert. denied*, 383 U.S. 967, 86 S. Ct 1272 (1966). The HDO stated that an unauthorized transfer of de facto control resulted from the Associations' and Norcom's violation of the six-factor test set out in *Intermountain Microwave*, 24 RR 983 (1963). <sup>3</sup>

17. The Movants agree that, as alleged in the HDO, the *Intermountain Microwave* criteria were not observed. Accordingly, there is no disagreement between the parties regarding whether, pursuant to that test as applied in this case, Norcom assumed unauthorized de facto control of the stations licensed to the Associations without prior Commission consent, in violation of §310(d) of the Communications Act. Norcom assumed more control over the operations of the Associations' stations than permitted under the *Intermountain Microwave* standard. Thus, the Movants believe that the facts set forth above, about which there is no disagreement, support the legal conclusion that Norcom and the Associations violated Section 310(d) of the Act, based on the *Intermountain Microwave* standard, by engaging in unauthorized transfers of control of Station WPAT918, WNXT323, WPAZ643, WPAP734, and/or WPAT910. Movants request summary decision adverse to Norcom and to the Associations on this issue. Issue (a) IS RESOLVED against Norcom and the Associations respectively.

(b) *To determine whether Norcom, East End, LMR 900, ... and/or... [NY LMR] violated Section 90.179(f) of the Commission's Rules, 47 C.F.R. § 90.179(f), by operating Station WPAT918, WNXT323, WPAZ643, WPAP734, and/or WPAT910 on a for-profit basis.*

18. Applying the *Intermountain Microwave* criteria in this case, Norcom essentially "stands in the shoes" of the Association licensees whose two-way radio stations it manages. Movants allow that because Norcom is not authorized to provide service on a not-for-profit basis (HDO, ¶3), and because, under the *Intermountain Microwave* criteria, Norcom assumed control of the Associations' stations, Norcom and the Associations violated Section 90.179(f) of the Commission's Rules, 47 C.F.R. § 90.179(f), by operating Stations WPAT918, WNXT323,

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<sup>3</sup> HDO, ¶9. Norcom moved the Presiding Judge to delete the issue of unauthorized transfer of control based on the FCC's use of the *Intermountain Microwave* criteria. See Norcom's Motion to Delete and/Or Change Issues, filed December 9, 1998, attached hereto as Exhibit G. The Presiding Judge denied that motion, and subsequently denied Norcom's Motion for Permission to Appeal. See *Memorandum Opinion and Order*, FCC 99M-4 released January 15, 1999.

WPAZ643, WPAP734, and WPAT910 on a for-profit basis. There is no disagreement regarding the above facts. Movants request summary decision adverse to Norcom and the Associations on this issue. Issue (b) IS RESOLVED against Norcom and the Associations respectively.

*(c) To determine whether Norcom has abused the Commission's processes in connection with the creation and/or control of the Associations and/or with the control and/or operation of the Associations' stations.*

19. Since the time the HDO was issued, new facts and evidence have been developed which support the conclusion that Norcom did not abuse the FCC's processes. Indeed, the WTB advises that it believes that Movants have satisfied §1.251 of the Commission's Rules in this regard.

20. Norcom and the Associations relied on the advice of counsel during the formation of the Associations, the course of the Associations applying for FB7 authorizations, and the preparation of management agreements pursuant to which Norcom would manage the Associations' stations (Ex. A, ¶s 3-4; Ex. B, ¶5). The Movants were advised by counsel that FCC regulations allowed the licensing of FB7 stations to non-profit associations organized for the purpose of providing wireless communications service to eligible entities on a non-profit basis, and, until the release of the HDO, the Movants believed themselves to be in compliance with all applicable FCC regulation (Ex. A, ¶s 3-4 ; Ex. B ¶s 5-6). In particular, the previous and current controlling principals of Norcom believed that the management agreements between Norcom and the Associations complied with the FCC's legal standards (Ex. B, ¶s 5-6; Ex. C, ¶6). At the time it issued the HDO, the FCC, and the WTB in particular, was not aware of the extent to which the Movants relied on the advice of counsel and their good faith interpretation of FCC control standards for private land mobile radio station (Ex. A, ¶s 3-4; Ex. B, ¶s 5-6).

21. While it is true that reliance on the advice of counsel is not a complete defense to all FCC rule violations, the agency has recognized that reliance on the advice of counsel may constitute a mitigating factor when violations relating to a regulatee's character are adjudicated. For example, in *Fox Television Stations, Inc.*, the Commission found that Fox's good faith reliance on the advice of counsel involving "a complex area of the law" was an excuse to Fox's alien ownership violations.<sup>4/</sup> In this case, Norcom and the Associations were advised by counsel, and believed, that the formation of the Associations and the management agreements pursuant to which Norcom would manage the Associations' stations complied with all applicable FCC regulations (Ex. A, ¶s 3-4, 8; Ex. B, ¶s 5-6). In light of Commission precedent Norcom's reliance on advice of counsel is deemed to be mitigating in this case.

22. The Movants never attempted to conceal the existence of a relationship between

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<sup>4</sup> *Fox Television Stations, Inc.*, Memorandum Opinion and Order, 10 FCC Rcd 8452 at ¶119 (1995) ("Fox"). See also *Abacus Broadcasting Corp.*, 8 FCC Rcd 5110, ¶12 (Rev. Bd. 1993) ("[T]he Commission has been...reluctant to impute a disqualifying lack of candor to an applicant where the record shows good faith reliance on counsel") (citations omitted).

Norcom and the Associations (Ex. A, ¶s 6-7; Ex. B, ¶7). Throughout the application process and negotiation of the 1992 Settlement Agreement, the Associations, in part based upon an inquiry from the agency's staff, disclosed to the FCC that Norcom would manage the stations for the Associations (Ex. A, ¶s 6-7); Ex. G, attached Ex. B). Movants also note that WTB lost documentary evidence of Norcom's role in the Associations' stations in a June 1996 flood that pre-dated the WTB's investigation of Norcom and the Associations (Ex. D and Ex. E). Bureau counsel questions whether the lost documents were adequately informative, but does not challenge Norcom's and the Associations' denial of withholding any information.

23. Movants note that contrary to the mistaken allegation in the HDO, Norcom was eligible to obtain channels in the 800 MHz band designated for entities operating facilities on a not-for-profit basis at the time the Associations were formed and to use those channels in connection with its SMR facilities. At that time, pursuant to the agency's "inter-category sharing" policy, the rules permitted SMR licensees to apply for additional channels, within 40 miles of their existing transmitter sites, in the so-called "Business" and "Industrial/Land Transportation" frequency pools, where channels were available for entities offering service on a not-for-profit, cost shared basis, provided that the SMR licensees had already loaded their existing systems to at least 70 mobiles per channel (47 C.F.R. §90.621 (1991)). While Norcom could not have secured authorizations for the same number of channels at the same sites as the Associations ultimately obtained licenses, based on its then-existing loading level, Norcom was eligible to secure Business or Industrial/Land Transportation pool channels, as the FCC's policies permitted (Ex. 1). This evidence casts doubt on the FCC's assertion that Norcom formed the Associations because it had no other means by which to obtain additional spectrum for commercial services.

24. At the time it adopted the HDO, the FCC's "inter-category sharing" policy had been terminated for several years (See First Report and Order, PR Docket No. 93-144, 11 FCC Rcd 1463, ¶138, released December 15, 1995), and the agency did not possess information concerning Norcom's level of mobile loading in the 1991-1992 time frame. Thus, the FCC was unable to consider whether the availability of "inter-category sharing" affected its assertions in the case.

25. Additionally, Movants argue Norcom's participation in the formation of the Associations and the preparation of the Associations' applications were not unlawful nor unusual; nor was Norcom's subsequent engagement as the manager unlawful. As noted in the Petrutsas Declaration, third party management arrangements of radio facilities were common in the land mobile radio industry and were sanctioned by the Commission (Ex. A, ¶2).

26. The Movants assert that Norcom did not abuse the Commission's processes. Movants correctly argue that abuse of process is "not an easy matter to prove," *WWOR TV, Inc.*, 7 FCC Rcd 636, ¶24 (1992), and must be based on "more than a generalized concern." A conclusion that an entity abused the FCC's process requires a "specific finding, supported by the record, of abusive intent." *Evansville Skywave, Inc.*, 7 FCC Rcd 1699, 1702 n.10 (1992). With regard to required disclosures in the application process, only intentional non-disclosures will support a finding of abuse of process. *Eunice Wilder*, 4 FCC Rcd 5310, ¶ 251 (1989).



27. In light of the foregoing facts, about which there is no material disagreement, it is deemed that Norcom did not abuse the Commission's processes in connection with the creation and/or control of the Associations and/or with the control and/or operation of the Associations stations. Accordingly, the abuse of Commission's processes issue IS RESOLVED in Norcom's favor.

*(d) To determine, in light of the evidence adduced pursuant to the foregoing issues, whether Norcom, East End, LMR 900, ... and/or...[NY LMR] are basically qualified to be Commission licensees.*

28. The Movants concede that they violated Section 310(b) of the Communications Act, based on the *Intermountain Microwave* transfer of control criteria cited in the HDO, and that, based on that violation, they also violated § 90.179(f) of the Rules. However, an unauthorized transfer of control, standing alone, is not a sufficiently egregious violation, under FCC precedent, to implicate disqualification of the entities involved. In general, unauthorized transfers of control lead the Commission to consider license revocation only when the violation is concealed through misrepresentation or other deception. *IDB Communications Group*, 10 FCC Rcd 1110, n. 42 (1994). The agency has held that, when parties make their actions known to the Commission and "no culpable non-disclosure or concealment in this regard appears on the record," then "the severe sanction of revocation of license is not warranted." *Blue Ribbon Broadcasting, Inc.*, 90 FCC 2d 1023 ¶9 (1982).

29. As noted above Norcom did not attempt to conceal its role in the formation of the Associations or the management of the Associations' stations. Moreover, until the release of the HDO, Movants believed that the arrangements for managing the Associations' stations complied with what they believed were the applicable standards (Ex. A ¶s 4, 8; Ex. B, ¶6 ; Ex. C, ¶6). Inasmuch as FCC precedent requires that revocation is only appropriate in the most severe of violations, revocation of Norcom's licenses is not deemed appropriate.

30. The same conclusion must be drawn regarding the Movants' violation of FCC rule Section 90.179. That violation occurred because the Movants assuming control of the Associations' stations was rendered unlawful according to the criteria set out in *Intermountain Microwave* (above). Inasmuch as the Movants' commission of an unauthorized transfer of control is not deemed disqualifying the same ruling is indicated for the §90.179 violation.

31. While Norcom acknowledges its lack of compliance with the FCC's policies in the pending matter, its actions do not evince such a pervasive unwillingness or inability to meet the basic responsibilities of a licensee as to warrant the sanction of removal of all license rights (See *KQED Inc.*, 3 FCC Rcd 2821, ¶37 (1988). In sum the foregoing facts about which there is no material disagreement, indicate that Norcom remains qualified to be a Commission licensee. Issue (d) IS RESOLVED in Norcom's favor.

32. Pursuant to the Settlement Agreement, the Associations have agreed to surrender their licenses for cancellation. In light of the action taken here approving and adopting said Agreement the issue of whether the Associations are qualified to be Commission licensees is rendered moot.

*(e) To determine, in light of the evidence adduced pursuant to issues (a)-(d), whether the above-captioned licenses should be revoked.*

33. Since it has been concluded that Norcom remains qualified as an FCC licensee, there is no further basis upon which to revoke Norcom's licenses captioned in the HDO. Moreover, as noted above, pursuant to the Agreement, the Associations have agreed to surrender their authorizations for cancellation. Accordingly, there is no need to address whether the Associations' licenses should be revoked. Accordingly, issue (e) IS RESOLVED in the Movants favor.

*(f) To determine, in light of the evidence adduced pursuant to issues (a)-(d), whether the above-captioned applications should be granted.<sup>5/</sup>*

34. In this case, the captioned applications are not applications for new radio station facilities, but are instead merely applications for modification of existing two-way radio station facilities that are unrelated to the facilities operated by the Associations (Ex. C, ¶7). The Movants request that the Presiding Judge dismiss the applications without prejudice to their resubmission after this hearing proceeding is completed. Because Norcom would remain qualified to hold FCC licenses, it is presumed that Norcom should have the ability to request modification of those licenses, consistent with the agency's normal application processing rules. Accordingly, there is no genuine issue of material fact relating to the pending applications and Movants request of the dismissal of the applications without prejudice, IS GRANTED.<sup>6/</sup>

#### JOINT REQUEST FOR APPROVAL AND ADOPTION OF SETTLEMENT

35. The parties filing the Joint Request constitute all of the parties remaining in this proceeding. In the accompanying Settlement Agreement, the parties agree to appropriate sanctions and other measures to ensure future compliance. Specifically, the Licensees agree, among other things, to the imposition by the Presiding Judge of forfeitures. Norcom agrees to pay a \$110,000 monetary forfeiture and East End, LMR 900 and NY LMR agree to pay a \$3,000 monetary forfeiture each. In addition, Norcom agrees to implement a compliance program, and the captioned Associations agree to surrender their licenses to the Commission, if they have not already done so.

36. The Bureau generally agrees with the Movant's recommendations. The HDO permits a maximum forfeiture penalty of \$185,000 against Norcom. The Commission's Forfeiture Policy Statement, which became effective on October 14, 1997, provides that cases arising from facts that occurred prior to the effective date of the Forfeiture Policy Statement shall be decided on

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<sup>5</sup> These applications are for modification of Norcom's stations WNQF836, WZA770, and WNBW505.

<sup>6</sup> See 47 C.F.R. §1.934(a)(3)(1999) (permitting hearing officer to dismiss application without prejudice upon a showing of good cause).

ORDERING CLAUSES

Accordingly, IT IS ORDERED that the Joint Motion For Summary Decision, filed July 22, 1999, by Norcom and the Associations IS GRANTED and issues (a) and (b) ARE RESOLVED against Norcom and the Associations and issues (c), (d) and (e) ARE RESOLVED in Norcom's favor;

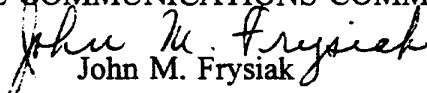
IT IS FURTHER ORDERED that the Joint Request For Approval and Adoption of Settlement filed simultaneously with the above stated Motion For Summary Decision, IS GRANTED, and the Settlement Agreement attached thereto IS APPROVED;

IT IS FURTHER ORDERED that this Summary Decision constitutes an ORDER OF FORFEITURE against Norcom in the amount of \$110,000.00 and against East End, LMR 900, and NY LMR to each pay \$3,000.00;

IT IS FURTHER ORDERED that Norcom shall institute a compliance program in accordance with the Settlement Agreement approved herein; and that the Wireless Telecommunications Bureau process Norcom's pending applications.

IT IS FURTHER ORDERED that this proceeding IS TERMINATED.<sup>8/</sup>

FEDERAL COMMUNICATIONS COMMISSION

  
John M. Frysiak  
Administrative Law Judge

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<sup>8</sup> In the event exceptions are not filed within 30 days after the release of this Summary Decision, and the Commission does not review the case on its own motion, this Summary Decision will become effective 50 days after its public release pursuant to Section 1.276 (d) of the Commission's Rules [47 CFR §1.276(d)].

a case-by-case basis.<sup>7/</sup> Since the violations preceded the Forfeiture Policy Statement, the appropriate forfeiture should be determined using the case-by-case method. Section 503(b)(2)(d) of the Act requires that the Commission consider "the nature, circumstances, extent and gravity of the violation, and, with respect to the violator, the degree of culpability, and history of prior offenses, ability to pay, and such other matters as justice may require" when assessing a forfeiture.

37. Norcom's violations of Section 310(d) of the Act [unauthorized transfer of control] and Section 90.179(f) of the Commission Rules [for-profit use of nonprofit frequency] are serious offenses which, by their nature, call for a substantial monetary forfeiture. The circumstances which must be considered in determining the amount of Norcom's monetary forfeiture include the multiple violations of Norcom (involving five trunked systems), the potential for substantial monetary gain by Norcom, and the long period of time during which Norcom's violations continued (beginning with the original license grants in 1992). The potential for substantial economic gain by Norcom, in particular, requires a very substantial forfeiture penalty in order to deter similar conduct by others. Considering all of these circumstances, the Bureau submits that \$110,000 is an appropriate forfeiture penalty for Norcom in this instance.

38. The HDO specifies a maximum forfeiture liability of \$37,000 for each Association. Although Norcom violated the same rule sections as each Association, the forfeiture imposed against each Association should be significantly lower than Norcom's forfeiture. Norcom which controlled the Associations is primarily culpable for the violations. Each Association was involved in only a portion of Norcom's overall scheme. Furthermore, the Associations did not receive any revenue from their stations and had no potential for substantial monetary gain. Considering these circumstances, the Bureau submits that \$3,000 is an appropriate forfeiture penalty for each Association in this instance.

39. In sum, the Bureau agrees with Movants' recommendations, noting that Movants have offered substantial evidence that supports summary decision of the designated issues. The Bureau believes that Movants have adequately demonstrated that there is no genuine issue of material fact remaining for determination at the hearing and agrees with the Movants' plea that they have satisfied their burden of showing that summary decision of the designated issues is warranted and would serve the public interest in this instance. In light of all the foregoing, the Joint Request For Approval and Adoption of Settlement and the Joint Motion For Summary Decision will be granted.

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<sup>7</sup> *The Commission's Forfeiture Policy Statement and Amendment of Section 1.80 of the Commission's Rules (Forfeiture Policy Statement)*, 12 FCC Rcd 17087, 17108-17109 (1997).